No. 14,586

United States Court of Appeals

For the Ninth Circuit

NG YIP YEE,
Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

SALVATORE C. J. FUSCO,
835 Clay Street, San Francisco 8, California,
Attorney for Appellant.

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No. 14586

United States Court of Appeals
For the Ninth Circuit

NG YIP YEE, *Appellant,* vs. BRUCE G. BARBER, District Director, Immigration and Naturalization Service, *Appellee.*	

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

This is an appeal from an order entered in the District Court of the United States for the Northern District of California, Southern Division, on 29 September 1954, dismissing the appellant's Petition for a Writ of Habeas Corpus.

JURISDICTION.

Jurisdiction of this Court to review the order of the trial Court is provided for by Section 2253 of Title 28 U.S.C.A.

STATEMENT OF FACTS.

The appellant, Ng Yip Yee, was born 7 April 1931 in China, the natural and legal son of Ng Ah Saw, a citizen of the United States born in Seattle, Washington, 6 September 1886.

The appellant made his application before the United States Consul in Canton, China, in the year 1949, for recognition of his United States citizenship, and after investigation by the United States Consul and the Secretary of State, the Passport Division of the State Department, Washington, D. C., recognized his claim to United States citizenship, and the American Consul at Hong Kong, B. C. C., was directed to issue him, and did issue, a valid passport on or about 1 July 1953.

The appellant arrived at the Port of San Francisco on 27 August 1953, and thereafter was detained by the order of the appellee, the District Director of the Immigration and Naturalization Service, an agent of the Attorney General, without the right of bond. During the period of detention, the passport of the appellant was summarily revoked, without hearing, and the appellant was reduced to the status of an alien seeking entry to the United States.

A Writ of Habeas Corpus was filed on 15 September 1953, and from the order of dismissal an appeal was taken to the Court of Appeals for the Ninth Circuit, which dismissed the appellant's cause on 24 December 1953 for lack of jurisdiction. (*Ng Yip Yee v. Bruce Barber,* 113 Fed. 2d 116.)

The appellant was ordered excluded, from which decision an appeal to the Board of Immigration Appeals was dismissed, and after being confined for more than a year in detention appellant was released on parole. On 27 August 1954 a Writ of Habeas Corpus was filed in the District Court, from the dismissal of which this appeal results.

The evidence showed that three sons and a daughter of Ng Ah Saw, the brothers and sister of appellant, as well as the father testified on his behalf, and the record shows that all the favorable testimony given by the father and brothers and sister was ignored by the hearing officer, arbitrarily and upon mere caprice, as were numerous family photographs, which were admittedly strong evidence of family relationship, as well as documents of birth, school records, bank drafts, and family letters, which were put into evidence during the administrative hearing and are contained in the record.

Again, the record shows that the appellee arbitrarily entered into evidence only a portion of the hearing of Ng Yip Yee before the Secretary of State, which was part of the application for a passport, and excluded a portion of said hearing, and further that documentary evidence offered by the appellant and admitted in evidence was carelessly misplaced by the Government and lost forever to the use of appellant.

Further, the record shows that the appellee arbitrarily discredited the expert testimony of a witness who was a former employee of the appellee in that

capacity of expert, and that the appellee discredited its own witnesses when the testimony adduced during the hearing proved favorable to the appellant.

The hearing officer invoked conjecture, supposition and imagination and deduced that the appellant was the son of someone other than Ng Ah Saw, the father of appellant, and further, the appellant was charged with fraud and imposition by the appellee, although the record fails to show any evidence of fraud. The appellee failed to produce any testimony showing that the appellant was an imposter, and did not base his findings upon evidence produced at the inquiry as required by Section 236, Immigration and Nationality Act, 8 U.S.C. 1226.

SPECIFICATION OF ERROR.

Specifications of errors are set forth at page 27 of the Transcript of Record.

ARGUMENT.

The Court did not hear the matter with respect to the objections of appellant regarding the administrative hearing. The record, consisting of numerous pages of single-spaced typing, exhibits, files and documents covering two hearings and two appeals, was put in evidence.

As to the first specification of error, we must conclude that if any unfairness appears on the face of

the record of the administrative hearing, then the Court was in error in holding that a "full and fair hearing was granted."

At the outset of the proceedings, appellant's United States passport was taken up and cancelled without a hearing. The fact that appellant was in possession of a valid passport, issued to him as a citizen of the United States by the Secretary of State, was ignored completely by the Attorney General, and appellant was arbitrarily thereupon reduced from the status of at least a prima facie citizen to that of an alien.

This was contrary to the rule of law as set forth in *U. S. v. Browder,* 113 F. 2d 97:

> "A passport certifies that the person therein described is a citizen of the United States and requests for him while abroad for permission to come and go as well as lawful aid and protection, and is a document which from its nature and object is addressed to foreign powers."

Another pertinent fact that the trial Court overlooked was that the Secretary of State having already decided the question of citizenship of appellant, then he was a citizen of the United States, and the mere revocation and defacing of the passport did not in itself reduce him to the status of an alien.

This point was decided in *Gillars v. United States,* 182 F. 2d 962:

> "In any event the revocation of a passport, nothing more appearing, does not cause a loss of citizenship, or dissolve the obligation issuing from citizenship."

It cannot be stressed too greatly that at the outset of the hearing and proceedings appellant was not given a full and fair hearing, with respect to all his rights, wherein he was denied due process in that he was not permitted to defend his right to possess his passport and that he was not given notice of the reason his passport was summarily and perfunctorily revoked. This act of the appellee was an absolute denial of due process of law as guaranteed by the Constitution.

This question of the revocation of a passport without a hearing was decided by three justices en banc, *Bauer v. Acheson,* 106 Fed. Supp. 445, wherein it was held that the Secretary of State was without authority to summarily revoke a passport, without prior notice or opportunity for hearing.

In the second point of error, the Court found that appellant was a mere claimant to citizenship, or an alien seeking admission, with the burden of proof. To the contrary, the appellant was a citizen of the United States in possession of a valid passport at the time of his entry.

In *Gee May v. McGrath,* 111 F. 2d 327, the Court held:

> "A determination of status of a Chinese as a son of an American citizen creates a prima facie case in behalf of such Chinese in subsequent habeas corpus proceedings for release from custody under exclusion proceedings."

The record shows that appellant was detained and interrogated for days without aid of counsel, that he

was never given notice of the reason for his detention nor the reason for the cancellation of his passport, and was thus precluded from meeting the charges and preparing his defense.

The fourth and fifth specifications of error relate to production of evidence, consisting of the State Department record covering the acknowledgment of appellant's citizenship. Appellee joined the appellant in requesting the State Department record (p. 144) but considered a subpoena duces tecum against an officer of the State Department as illegal. Thereafter the hearing officer obtained possession of said record (see pp. 227, 228) but refused to produce it, admitting only part thereof. A fair hearing would require appellee to produce all of the record then in his possession.

The withholding of this evidence by the appellee constituted an unfair and illegal hearing.

As to point six, the case of *Ng Yip Yee v. Barber,* 210 F. 2d 613, does not preclude the appellant from raising the question of his rights as a citizen and as accorded by the Secretary of State and does not permit the Attorney General wilfully to disregard and put aside appellant's citizenship and place upon him an unfair burden of proof.

Chun Kock Quon v. Proctor, 92 Fed. 2d 326, holds:

> Where there has been a prior determination of citizenship by the immigration officials, it makes a prima facie case of citizenship.

See also *Wong Gum v. McGranery,* 111 Fed. Supp. 114.

The record shows that the Attorney General did not carry the burden of proving his charges of fraud, nor did he dissipate the prevailing presumption of appellant's claim to citizenship. The courts and the Board of Immigration Appeals have on many occasions held that a prior administrative determination of citizenship, while not res judicata in the same sense as a court judgment, nevertheless requires clear, affirmative proof of fraud in the first instance to set aside the finding of citizenship. *Choy Yuen Chan v. U. S.*, 30 F. 2d 516.

See also *Ng Fung Ho v. White,* 366 Fed. 765.

As to point seven, the Court was correct with respect to the rule of law but was in error as to the application thereof.

The Court relied on *Weedin v. Young,* 43 F. 2d 465, wherein there were findings that resulted from expert testimony with respect to the age of the applicant, and the facts produced were matters of positive evidence.

In the case of appellant, the appellee failed to produce any witnesses that gave or could give any positive, uncontradicted testimony, and the only facts as shown by the hearing record were "facts" deduced by inference, supposition and imagination of the hearing officer. Therefore, the record does not show any facts produced by the appellee, and whatever testimony was produced by the appellee, certainly cannot withstand the axiomatic "reasonable, prudent man" test. The findings of fact by the appel-

lee were based upon caprice and an arbitrary decision of the hearing officer.

At page 172 of the Special Inquiry Record of 24 March 1954, the hearing officer deduced this statement, "And information has been furnished that this applicant is not in fact the son of Ng Ah Saw but the grandson." This statement was not supported by any evidence or testimony of a single witness.

Again at page 205 of the said record, dated 31 March 1954, the special inquiry officer attempted to prove that appellant was the son of his aunt, Lum May Yee, by means of a government witness, who had already identified appellant as the son of Ng Ah Saw.

With respect to errors 8 and 9, the evidence was overwhelmingly in support of the appellant's position, and the appellee's findings were unreasonable.

Three brothers, one sister, and the father of appellant appeared in his behalf and gave positive and uncontradicted evidence in establishing the family relationship as claimed by the appellant.

The aunt of appellant, Lum May Yee, testified that she was present at the time of his birth, and a son of Lum May Yee also identified appellant. A fellow villager, Ng Kwock Fung, gave positive and uncontradicted evidence and did identify appellant as the son of Ng Ah Saw, his father. (pp. 195-210.)

An expert witness, a former employee for 24 years of the Immigration Service primarily as identification expert of Chinese persons, gave positive and

uncontradicted evidence, identifying certain photographs of appellant and his family which were contained in the records of the Immigration Service since 1938, and found such resemblance of features of appellant and his father indicating family relationship. It has been held that such resemblance proves close blood relationship, if existent. *Chooey Dee Ying v. U. S.*, 214 Fed. 273.

Documentary evidence, which included school records, drafts of remittances of support sent by the father of appellant, family correspondence, a village certificate identifying appellant, and other photographs of him taken with members of his family, were produced and admitted in evidence, yet the record will show that all of the testimony and evidence was arbitrarily ignored and capriciously rejected by the appellee.

There may have been minor discrepancies as to insignificant details, but as to the essential points with respect to establishing the paternal relationship between appellant and Ng Ah Saw, the record will show positive evidence, uncontradicted, which was in accord with the testimony given by all the brothers, sister and father. The appellant gave as his reason for discrepancies his long detention while incommunicado, the long periods of continued examination, and harassing by the interrogators. At one point of the hearing (p. 107) appellant stated his reason for discrepancies: "I was questioned every day for a period of one to two weeks." At page 112 he stated: "On the day of my arrival in San Fran-

cisco I was detained by the immigration authorities. I was scared and was not able to see any of my relatives or talk to anyone. Because I was detained by the immigration authorities right away after I arrived in San Francisco, my mind was confused, and I did not remember everything, so I said my mother died in the village." It should be noted that the village is contiguous to the city and there was a family home in the village and the city.

With respect to discrepancies, *Gung You v. Nagle,* 84 Fed. 2d 848 holds:

> Rejection of testimony of father and brothers supported by records of department, notwithstanding discrepancies, is unfair.

During the hearings over a period of more than a year, the hearing officer exhausted great efforts to produce or create discrepancies between witnesses produced by the appellant or the Government. This again constitutes an unfair hearing, as was held in *Go Lun v. Nagle,* 22 Fed. 2d 246:

> The purpose of a hearing is to inquire into citizenship and not to develop discrepancies.

See also:

Nagle v. Dong Ming, 26 Fed. 2d 438.

With respect to specification of error No. 10, the appellant does not presume to ask the Court to substitute its judgment on the question of fact, but appellant contends that the Court failed to find the decision was without any factual support and was, therefore, arbitrary and a denial of a fair hearing,

which was a denial of due process. The record is devoid of any testimony or evidence of any nature that would establish that appellant was an imposter or a person other than that of the son of Ng Ah Saw, his father.

> *U. S. ex rel. Hom Lung Wun v. Reimer,* D.C., N.Y., 1940, 31 Fed. Supp. 819:
>
> On review of decisions of administrative officials charged with duty of enforcing immigration laws, issue before court is not how court would have decided questions, but whether decision of administrative officials was wholly arbitrary, amounting to denial of fair hearing.

The special inquiry officer, on pages 9 and 10 of his decision, dated 7 May 1954, gives as a basis for his findings as follows:

> "The records of the Immigration and Naturalization Service and the State Department contain evidence of too many frauds involving claims of admissibility to the United States in every conceivable status or relationship to be ignored. In this connection a remark by one of the judges of the Ninth Circuit Court (Feb. 15, 1954) to counsel in argument before the Court concerning a so-called 503 action, is pertinent. 'The Court can take judicial notice that notorious practices exist in the Chinese citizenship claims, and therefore there is good reason to suspect that these cases are fraudulent. It is curious that the Chinese all have sons, and I know that the majority of the cases (prior Chinese cases) were fraudulent.' While this hearing was underway, another hearing was being

held across the hall, involving an applicant for admission of the Chinese race as a United States citizen, arriving with a United States passport, who admitted that several years before he had been fraudulently admitted to the United States as a citizen, and the hearing developed that his latest effort to violate the laws of this country proved to be a fictitious marriage with his sister and thereafter submitting a petition for a non-quota immigration visa in her behalf. Coincident with this case three Chinese aliens appeared in the United States District Court in San Francisco and pleaded guilty to violation of the immigration and nationality laws of this country involving the fraudulent entry of 16 aliens in all. In the case of one of these aliens $4800 was involved in the single proceedings. The stage for this wholesale violation was set when an elderly Chinese brought in two families, one under the exempt status of the children of a merchant and the other family as citizens under fraudulent claims to citizenship. The record of such flagrant violations and the opportunity therefor cannot be disregarded."

The language of the hearing officer is significant with respect to his personal prejudice, which strongly shows the influence of the trial Court ruling in the cases of *Ly Shew v. Dulles,* Civ. No. 13808, and *Mar Gong v. Brownell,* 209 Fed. 2d 448, with respect to remarks of the Court concerning persons of Chinese descent claiming citizenship. Such practice of the trial Court was overruled by the Court of Appeals for the Ninth Circuit in the above quoted cases.

In *Mar Gong v. Brownell,* 209 Fed. 2d 448 the Court of Appeals held:

> "We recognize all that may be said with respect to the necessity of the court guarding against imposition, but we also are of the view that no special quantum of proof should be exacted from any person claiming American citizenship merely because of his racial origin. In Kwock Jan Fat v. White, 253 U.S. 454, 464, the Supreme Court, reversing this court, said: 'It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.' "

The hearing officer further stated at page 9 of the decision of 7 May 1954:

> "As stated in my prior opinion in this case, the matter being one of identity brings up consideration of what degree of proof is necessary in order to establish that identity. It has been ruled that an applicant either for citizenship or for admission to the United States as a citizen has the burden of convincing a proper authority by satisfactory evidence that he is entitled to citizenship, and that burden never shifts to the Government. The rule is that the proof of alleged citizenship must be clear and convincing, (Lee Sim v. U. S. 218 Fed. 432, 435 (2 Cir. 1918) Ex Party Chin Him et al. 227 Fed. 131, 133 (W.D.N.Y. 1915)). Since I find the evidence presented in support of the applicant's cause to be neither satisfactory, nor clear, nor convincing, he has not sustained his burden of proof and his application for admission should be denied."

This position is in contradiction to the ruling of the Court of Appeals for the Ninth Circuit in *Ly Shew v. Dulles*:

> "On the contrary, once that 'priceless' right is established, the burden on the United States for its deprivation is that the proof shall be 'clear, unequivocal, and convincing.' Baumgartner v. United States, 332 U.S. 665, 671."

Such conduct of the hearing officials is contrary to Section 236 of the Immigration and Nationality Act, 8 U.S.C. 1226, which requires that findings cannot be based upon evidence not related to or not produced at the hearing.

As to No. 11 of the errors set out in appellant's brief, the Court held that appellant was placed with the burden of proof. As related supra, appellant was given a hearing by the Secretary of State in accordance with Section 104(a)(3) of the Immigration and Nationality Act, and was issued a valid passport after having been adjudicated a citizen. Here we have a person traveling to the United States, bearing a passport as a citizen, who is stopped at the gate of entry by the Attorney General, who on mere suspicion denies the citizenship of that person. Appellant contends that under these circumstances, having made a prima facie case of citizenship, it was encumbent upon the appellee to go forward with the proof.

Quon v. Proctor, 92 Fed. 2d 326, holds:

> Where there has been a prior determination of citizenship by the immigration officials, it makes a prima facie case of citizenship.

Again in *Lee Choy v. United States,* 49 Fed. 24:

> "Prior determination of citizenship is proof which must be overcome."

We now reach the last point of error wherein the Court did not find unfairness in the hearing with respect to the charge of fraud made by the immigration authorities against the appellant.

The common law principle of fraud has not been changed by statute. The record of the hearing shows that the Attorney General charged the appellant with having procured his passport fraudulently; yet there was not a scintilla of evidence to support this charge, as evidenced by the hearing record.

Thereupon, the immigration authorities arbitrarily established the premise that appellant obtained his passport fraudulently and then placed upon him the burden of proving that he was not a fraud. This is contrary to the rule of *Ng Fung Ho v. White,* 366 F. 765:

> Where Chinese were admitted as citizens on evidence that their father was a native of the United States, the burden of attack rests on the Government, et seq.

The record shows an absence of proof of fraud or of any fraudulent act committed by appellant, and the resultant conclusion of the hearing officer constitutes unfairness and illegality of the hearing.

United States ex rel. Iodici v. Wixon, 56 Fed. 2d 825, holds:

> Act of Secretary of Labor in approving re-entry for alien was presumed to have been lawful until contrary was shown. Absent proof that alien's re-entry permit was obtained through fraud and failure of board to give it proper effect held arbitrary action, making proceedings culminating in exclusion unfair.

At page 9 of the special inquiry officer's decision, dated 7 May 1954, he charged:

> "Without indulging in speculation, there is certainly room to suggest that he (Ng Yip Yee) is indeed the son of Ng See Kay."

Ng See Kay was an absolute stranger to the proceedings, and no evidence appeared in the hearing to substantiate this charge.

At page 172 of the special inquiry record dated 24 March 1954, another statement of the hearing officer:

> "And information has been furnished that this applicant is not in fact the son of Ng Ah Saw but the grandson."

This charge is also unsupported by any evidence.

At page 205 of the hearing record, dated 31 March 1954, the Government provided a witness whom the special inquiry officer used in an attempt to prove that appellant was the son of his aunt, Lum May Yee, but failed in this charge.

CONCLUSION.

Therefore, it is contended that the appellant, a citizen of the United States, was unlawfully deprived of his passport, and that he was subjected to a hearing before the Immigration and Naturalization Service that was unfair, unlawful and illegal, and further, that the decision of the Board of Immigration Appeals and the order of deportation are arbitrary and capriciously founded and therefore illegal, and that a review of the entire hearing record will indicate that appellant was the subject of an unfair and illegal hearing.

We respectfully submit that the order and decree of the District Court should be reversed, and that writs be issued to remain in full force and effect, and that appellant be given his liberty to remain in the United States as a citizen of the United States.

Dated, San Francisco, California,
April 8, 1955.

Respectfully submitted,
SALVATORE C. J. FUSCO,
Attorney for Appellant.